.....IN THE.....

Supreme Court of the United States

OCTOBER TERM 1903.

DAVID J. HODGES, *ELLA M. PARKER,* *GERTRUDE W. HODGES and* *WILLIAM E. HODGES,* *Heirs at Law of* *JAMES L. HODGES,* *Appellants.* *vs.* *WILLIAM C. COLCORD,* *HENRY S. COLCORD,* *CHARLES F. COLCORD, and* *MARY L. GRIFFITH,* *Appellees.*	*NO 499*

BRIEF OF APPELLANTS

MAY IT PLEASE THE COURT:

This case involves lots 2, 3, 12, 13, 14, 15 and 18 in Section 5, Township 11, North Range 3 west, Oklahoma District O. T.

John Gayman made a pretended homestead entry on the above described land April 25, 1889.

James L. Hodges, the father of the appellants, made settlement on said land on the 22nd day of July, 1889. (Trans. 1) William R. Colcord, the father of the appellees, filed a contest

against the entry of John Gayman August the 23rd, 1889. (Trans. 2) The United States issued a patent to said land to said William R. Colcord on the 13th day of June, 1899. (Trans. 5.) That said William R. Colcord died about the 1st day of January 1901. James L. Hodges died on or about the 1st day of August, 1902, and the cause was revived in the name of his heirs in the Supreme Court of the Territory. (Trans. 15.) Said William R. Colcord died before the institution of this suit. On April 12, 1893 John Gayman filed his relinquishment to the United States. On the same day William R. Colcord made entry on the land.

The questions involved are these: It is contended by the appellants that James L. Hodges was the first legal settler on the land, and that by reason of his settlement made on July 22, 1889, and his improvements, his rights attached to the land, and that the entry made by John Gayman on the 25th day of April, 1889, was void, because John Gayman had entered the Oklahoma country before noon on April 22nd 1889, and because he was in the Oklahoma country at the hour of noon April 22, 1889. It is contended by the appellants that Gayman's entry was void, and did not segregate the land from the public domain It is further contended by the appellants that James L. Hodges was a settler on said land at the time John Gayman filed his relinquishment on the 12th day of April, 1893; That said relinquishment was not induced by Colcord's contest, and therefore Hodges' interest attached to the land instantly on the filing of the relinquishment by Gayman. It is further contended by appellants that at the time Colcord filed his contest against John Gayman's entry on the 23rd day of July, 1889, he had full notice of the settlement of James L. Hodges, which was made on said land on the 22nd day of July, 1889.

The errors complained of in the journal entry of the District Court. is that it erred in sustaining the demurrer to the petition and in dismissing plaintiff's cause of action.

BRIEF OF THE ARGUMENT.

The case of the Hastings and Dakota R. R. Company vs. Whitney, 132 U. S. 337, 10 Supreme Court reporter 112, is a case relied on by the appellees. In that case the United States

granted the State of Minnesota July 4, 1866, certain lands to aid in the construction of said railroad, subject to conditions therein stated, and on the 7th day of March 1868, the railroad was definitely located; and the rights of the railroad attached to the land granted, except such as had been appropriated prior to that date. Bently S. Turner, who was a soldier in actual service of the United States, through his agent had filed on 80 acres of land included in said railroad grant, on the 8th day of May 1865. The railroad claimed that Turner had not done acts sufficient for his interest to attach, and practically that his filing was void. The railroad claimed that the land had not been occupied or improved by Turner as required by law, and that his affidavit was insufficient. Turner's filings remained of record till September 30, 1872, when said entry was canceled by proper authority. On the 7th day of May 1877, Julia D. Whitney filed on Said land and in due course, a patent was issued to her by the United States. The trial court held as conclusion of law, that Turner's entry was void, that the title to the land vested in plaintiff under its grant, and that the entry of Julia D. Whitney, thereon, was unauthorized and of no effect. The Supreme Court of Minnesota reversed the decision. Turner filed under Sec. 2293 of the Revised Statutes which is set out in the decision. The court then said: "The question presented for our consideration is whether, upon the facts found and admitted, the homestead entry of Turner upon the land in controversy except it from the operation of the land grant under which the plaintiff in error claims title. "In this case Justice Lamar, in rendering the opinion of the court says: The doctrine first announced in Wilcox vs Jackman 13 Pet 498; that a tract lawfully appropriated to any purpose becomes thereafter severed from the mass of the public lands, that no subsequent law or proclamation will be construed to embrace it, has been re-affirmed and applied by this court in such a great number and variety of cases that it may now be regarded as one of the fundamental principles underlying the land system of this country. In Whitherspoon vs. Duncan 4 Wal 210, this court decided in accordance with the decision in Carroll vs. Safford 3 How 441 that lands originally public cease to be public after they have been entered at the land office, and a certificate of entry has been obtained, and the court

further held that this applies as well to homesteads and pre-emption as to cash entries; in either case, the entry being made and the certificate being executed and delivered, the particular land entered thereby becomes segregated from the mass of the public lands, and takes the character of private property. The fact that such entry may not be confirmed by the land office on account of any alleged defect therein, or may be cancelled or declared forfeited on account of non-compliancce with the law, or even declared void, after a patent has issued, on account of fraud, in a direct proceeding for that purpose in the courts, is an incident inherent in all entries of the public lands.

In the light of these decisions, the almost uniform practice of the department has been to regard land, upon which an entry of record valid upon its face, has been made, as appropriated and withdrawn from subsequent homestead entry, pre-emption settlement, sale or grant until the original entry be cancelled or declarad forfeited, in which case the land reverts to the government as a part of the public domain, and again becomes subject to entry under the land laws. The correctness of this holding has been sustained by this court in the case of railway company vs. Dunmever 113 U. S. 629, 5 Supreme court Lt Rep. 566 and the principle applied to a railroad in the act under which the plaintiffin error claims title to tract in controversy.

In that case a homestead claim has been made and filed in the land office by one Miller, and there recognized by a certificate of entry, before the line of the company's road was located. Subsequently to the location he abandoned his entry, and took a title under the railway company, and his homestead entry was cancelled. One G. B Dunmeyer, then entered the land under the homestead law, claiming that by the cancellation for abandonment, it had passed back into the mass of public lands, and was not brought within the grant; and upon that claim ousted the defendant in error, who afterwards brought action against the railroad company for a breach of covenant, obtaining a judgment in the court below, which was afterward affirmed by this court. The court said, Justice Miller delivering its opinion "the record shows that on July 25, 1866, Miller made a homestead entry on this land which was in every respect valid. In the lan-

guage of the act of congress, this homestead claim had attached to the land and it therefore did not pass by the grant. Of all the words in the English language, this word "attached" was probably the best that could have been used. It did not mean mere settlement, residence or cultivation of the land, but it meant a proceeding in the proper land office by which the inherent right to the land was instituted. It meant that by such a proceeding a right of homestead had fastened to that land, which could ripen into a perfect title by future residence and cultivation. With the performance of these conditions the company had nothing to do. "It is argued by the company that, although, Miller's homestead entry had attached to the land, within the meaning of the excepting clause of the grant, before the time of definite location was filed by it, yet when Miller abandoned his claim, so that it no longer existed; the exception no longer operated and the land reverted to the company; that the grant by its inherent force reasserted itself, and extended to or covered the land as though it had never been within the exception. We are unable to perceive the force of this proposition. No attempt has ever been made to include lands reserved to the United States, which reservation afterward ceased to exist, within the grant, though this road, and others with grants in similar language, have more than once passed through military reservations for forts and other purposes, which have been given up or abandoned as such reservation, and were of great value. Nor is it understood that, in any case where lands had been otherwise disposed of, their reservation to the government brought them within the grant. Why should a different construction apply to lands to which a homestead or pre-emptim right had attached? Did congress intend to say that the right of the company also attached, and which ever proved the better right obtained the land"? Counsel for plaintiff in error contends that the case just cited has no application to the one we are now considering, the difference being that in that case, the entry existed at the time of the location of the road, was an entry valid in all respects, while the entry in this case was invalid on its face, and in its inception; and this entry having been made by an agent of the applicant, and based upon an affidavit which failed to show the settlement and improvement required by law, was, on its face,

not such a proceeding in the proper land office, as could attach even an inchoate right to the land.

We do not think this contention can be maintained. Under the homestead law three things are needed to be done in order to constitute an entry on public lands: First, the applicant must make an affidavit setting forth the facts which entitle him to make such an entry; Second, he must make a formal application; and third, he must make payment of the money required. When these three requisites are complied with, and the certificate of entry is executed and delivered to him, the entry is made,—the land is entered. If either one of these integral parts of an entry is defective, that is, if the affidavit be insufficient in its showing, or if the application itself is informal, or if the payment is not made in actual cash, the register and receiver are justified in rejecting the application. But if, notwithstanding these defects, the application is allowed by the land officers, and a certificate of entry is delivered to the applicant, and the entry is made of record, such may be afterwards cancelled on account of these defects by the commissioner, or on appeal by the secre- of the interior; or, as is often the practice, the entry may be suspended, a hearing ordered, and the party notified to show by supplemental proof a full compliance with the requirements of the department, and on failure to do so, the entry may then be cancelled. But these defects whether they be of form or substance, by no means render the entry absolutely a nullity. So ong as it remains a subsisting entry of record, whose legality has been passed upon by the land authorities, and their actions remains unreversed, it is such an appropriation of the tract as segregates it from the public domain, and therefore precludes it from subsequent grants. In the case before us, at the time of the location of the company's road an examination of the tract books and the plat filed in the office of the register and receiver, or in the land office, would have disclosed Turner's entry of Record, accepted by the proper officers in the proper office, together with the application and the necessary money—an entry the imperfections and defects of which could have been cured by a supplemental affidavit or by other proof of the requisite qualifications of the applicant. Such an entry attached to the land a right which the road cannot dispute for any supposed failure of

the entryman to comply with all the provisions of the law under which he made his claim. A practice of allowing such contests would be fraught with the gravest danger to actual settlers, and would be subversive of the principles upon which the munificent railroad grants are based. As was said in the Dunmeyer case, supra: "It is not conceivable that congress intended to place these two parties (homestead and pre-emption claimants on the one hand, and the railway company on the other) as contestants for the land, with the right in each to require proof of the other of complete performance of its obligation. Least of all is it to be supposed that it was intended to raise up in antagonism to all the actual settlers on the soil, whom it had invited to its occupation, this great corporation, with an interest to defeat their claims, and to come between them and the government as to the performance of their obligations."

In addition to this, Section 2308 of the Revised Statutes provides: "Where a party at the date of his entry of a tract of land under the homestead laws, or subsequently thereto, was actually enlisted and employed in the army or navy of the United States, his services therein shall, in the administration of such homestead laws, be construed to be equivalent, to all intents and purposes, to a residence for the same length of time upon the tract so entered, etc." That act is a curative act, or rather, one putting a construction upon the prior act of 1864, under which the Turner entry was made. The effect of it is to declare service in the army or navy of the United States by applicant, at the date of an entry made under the act of 1864, equivalent to actual residence upon the land by him.

In that view of the case the affidavit in the the Turner entry was sufficient; for, in contemplation of law, he was then residing upon the tract embraced in his entry. Supreme Court Reporter Vol. 10, 114-15.

This is the leading case reliedon by the defendants, it lays down the doctrine contended for by plaintiff. The court will observe that this is a suit by a railroad against a homesteader. The uniform rule is that a railroad cannot contest a homesteader. If a homesteader has done any act by which his rights attach, before the location of the road, that would except the land from

the railroad grant. This provision is in all the acts of congress granting land to a railroad. When a right attaches, the land is excepted from the grant, and if from any cause the homesteader's entry is canceled, the land reverts to the United States and not to the railroad company. (See all the authorities refered to in the above case.)

The filing of Turner referred to was not void, it was such a filing as could be amended, or supplemental and Sec. 2308 of the Revised Statutes made it valid, and it was valid at the time of the permanent survey of the railroad, and hence, excepted it from the grant. When the entry was afterward cancelled, it reverted to the United States, so that when Whitney filed, her rights attached to the land.

When Justice Lamar rendered this decision he intended to state the law of that case, and anything else would be a dictum of the court, and would not be binding on any court. If this decision is intended to apply to all filiugs and entries in the land office, and bears the construction given it by the defendants, then it would completely tie the hands of congress, from all future disposition of the public domain. The court will observe that in all cases where the decisions refer to an entry segregating the land, it is such an entry as would attach an interest to the land, in other words, it would initiate a right to the land that would eventually ripen into a title. If such filings were defective they could be made good by showing the truth.

On March 1, 1889, (25 Sta. p 757, 759) congress passed an act with reference to Oklahoma land, containing this provision: "that the lands acquired by the United States under said agreement shall be a part of the public domain, but they shall only be disposed of in accordance with the laws regulating homestead entries, and to the persons qualified to make such homestead entries, not exceeding one hundred and sixty acres to one qualified claimant, and the provisions of twenty-three hundred and one of the revised Statutes of the United States shall not apply to any lands acquired under said agreement. Any person who may enter upon any part of said lands in said agreement mentioned prior to the time that the same are open to settlement by act of Congress shall not be permitted to occupy or make entry upon such lands or lay any claim thereto.

On March 2, 1889, (25 St. pp 980, 1005) congress passed an act (with reference to Oklahoma land) containing this provision: "and provide further, that each entry shall be in square form, as nearly as practicable, and no person be permitted to enter more than one quarter section thereof; but until said lands are open for settlement by proclamation of the president no person shall be permitted to enter upon and occupy the same and no person violating this provision shall ever be permitted to enter any of said lands or acquire title thereto."

On the 23rd day of March, 1889, the president issued his proclamation containing this warning:

Warning is hereby again expressly given that no person entering upon and occupying said lands before said hour of 12 o'clock, noon on the 22nd day of April, 1889, herein before fixed, will ever be permitted to enter any of said lands or acqure any rights thereto; and that the officers of the United States will be required to strictly enforce the aet of congress to the above effect. (26 St. p 1546)

If you give the decision in the case of Hastings and Dakota R. R. vs. Whitney, the construction contended for by defendants, then the acts of congress, and the proclamation of the president would be nugatory, and a party by fraud and perjury, could acquire rights, which he could not gain by swearing the truth. According to the doctrine contended for the defendants it was not necessary to obey the law above quoted. A party could enter the Oklahoma country before the time set, by law, select his land, go to the land office and swear falsely and by said fraud and falsehood, initiate a right to 160 acres of land, that he could make entry and acquire rights, in other words, he would initiate a right to the land. In the language of Justice Lamar, his rights would attach, and the land would be segregated and take the nature of private property."

This would be impossible according to the acts of congress above quoted and the proclamation of the President, which state that no person violating such provision shall be permitted to make entry, or acquire any right thereto. If the above acts of congress, and the proclamation of the President are law, then how could John Gayman, who violated these laws as shown by

the record, make entry to the land in controversey? How could his rights attach to said land in the face of that law? How could his pretended entry segregate the land? Every act of Gayman in attempting to acquire a title to the land in controversy was void, and the land was not segregated by his acts.

If a person who entered Oklahoma in violation of law, could acquire a right in the land, by making a false affidavit, and obtain a filing that would segregate the land, then enough people could have entered the country to select every quarter section in the country, and then line up at the various land offices, and make filings on the entire country before an honest legal settler could obtain a single filing. Not a legal settler could enter the country without being a tresspasser. It follows as a matter of course that if Gayman could enter the country in violation of law and segregate one quarter section, and place it in such condition, that no one else could acquire any rights by settlement, or any other way, till his entry was cancelled, then ten thousand men could have done the same thing. It would have put it in the power of the violaters of law to enter every quarter section in the country, and then if they saw that they would be contested, they could take a confederate to the Land Office, file a relinquishment, and let his confederate file on the land and obtain a patent.

When the case of Hasting and Dakota R. R. vs. Whitney is read by the court, keeping in view the case under consideration by the court, the court will see clearly, that the Justice had in view lawful entries, and such entries as would attach an interest to the land, and such entry as might be amended, if it did not state all the facts I submit to the court that John Gayman could not amend his affidavit, by setting out the truth, so as to give him a right. The truth would have been fatal to John Gayman's entry.

I challenge the appellees attorneys to show a single case where the United States Supreme Court has held that the lands were segregated from the public domain, except where the entry man had some of the elements of a qualified entryman, and had not done some act by which his right would attach. In the sanction of congress to be there; and that when the hour of

case at bar the entryman, John Gayman, was absolutely prohibited from making entry, or acquiring any right in the lands above named. By perjury and deception, he might obtain a paper that purported to be an entry, and have the records show that he had made an entry on the land in controversy, but in that case the entry would be a deception and a falsehood, but it would not confer any rights on John Gayman, It would not give him any right or equity in the land. No interest would attach. The authorities of the land department would have to investigate the matter, and if it was shown that the party had entered the country in violation of law, then it would be the duty of the land department to hold that said entry was void ab initio. The pretended entry of John Gayman, not giving him any right to the laud in controversy, could not segregate the land. It could never ripen into a title according to the act of congress March 1 and 2 above quoted

The Oklahoma lands were opened under the homestead laws. What would the appellees say of pre-emption, timber culture, military, or bounty, or donation claim, filed in the Oklahoma Land Office? If the officers of the local land office should entertain, any one, or all of the above claims grant entry, and make a record of it on the books and maps of the land-office, would the appellees contend that such filings would segregate the land and give the entryman a right? Such entries have been entertained under the acts of congress, and the books are full of decisions sustaining the same.

Why not file any kind of a claim on the Oklahoma land, and hunt up these decisions to show that they are valid? Such a proceding would be absurd and, it is equally absurd to contend that a man who is absolutely prohibited from making entry, or acquiring right to the land, can, by perjury, acquire a right and then try to sustain that doctrine by quoting Justice Lamar, in the case above mentioned, and other decisions rendered under the land grant acts of long ago.

In the case of Smith vs. Townsend, 13 Supreme Court Reporter 634, Justice Brewer speaking for the court said.

"But it is said that the appellant was rightfully on the railroads company's right of way; that he had the express

noon of April 22nd arrived he had as an American citizen, possessing the qualifications named in the homestead laws the right to enter upon any tract within the territory for the purpose of making it his homestead. While he may have had all the qualifications prescribed by the statue, and there is nothing to prevent congress, when it opens a particular tract for occupation, from placing additional qualifications on those who shall be permitted to take any portion thereof. That is what congres did in this case. It must be presumed to have known the fact that on this right of way were many persons properly and legally there. It must also have known that many othtr persons were rightfully in the Territory Indian agents, deputy marshals mail clerks, and many others; and if it intends that these parties thus rightfully within the territory on the day named, should have special advantage in the entry of of tracts they desired for occupancy, it would have been very easy to have said so. The general language used in these sections indicates that it was the intent to make the disqualifications universally absolute. It does not say "anv person who may wrongfully enter" etc. but "any person who may enter," rightfully or or wrongfully," is implied. There are special reasons why it must be believed that congress intended no relaxation of these disqualifications on the part of those on the company's right-of-way, for it is obvious that when a railroad runs through a country the settlers will immediately pour into it, and large cities wil shortly grow up along the line of the road; and it cannot be believed that congress intended that they who were on this right of way in the employ of the railroad company should have a special advantage of selecting tracts, just outside that right-of-way, and doubtless which would soon become the sites of towns and cities.

It may be said if this literal and comprehensive meaning is given to these words, it would follow that any one who, after March 2nd and before April 22nd, should chance to step with in the limits of the territory, would be forever disqualified from taking a homestead therein. Doubtless he would be in the letter of the statute; but if, at the hour of noon on April 22nd, when the legal barrier was by the president destroyed, he was, in fact, outside the limits of the territory, it may perhaps be said that if

within the letter he was not within the spirit of the law, and therefore not disqualified from taking a homestead. Be that as as it may, and it will be time enough to consider that question when it is presented; it is enough now to hold that one who was within the territorial limits at the hour of noon of April 22nd was, within both the letter and the spirit of the statute, disqualified to take a homestead therein.

The judgement of the Supreme Court of the Territory was right, and it is affirmed. Supreme Court Reporter, Vol. 13 page 637-38.

The Supreme Court of the United States has spoken on the subject, in the case of Calhoun vs. Violet, 19 Supreme Court Reporter, page 325. Justice White speaking for the court said:

The fact that the plaintiff had entered the territory prior to the time fixed by the statute and the proclamation of the president having been conclusively determined, it follows inevitably, as a legal result, that an entry of land made under such circumstances was void, and that the ruling of the land department so holding was correct. This leaves only open for our consideration the legal question whether Calhoun, because he was an honorably discharged soldier, was entitled to go into the territory before the designated time and make a valid entry of a homestead therein; the claim that he was authorized to do so is based on a proviso contained in section 13 of the act of March 2, 1889. (25 Stat. 980, 1005) which is as follows:

The above authorities show conclusively that John Gayman's entry was void and that no rights attached.

There are a great many decisions of the Supreme Court of the United States which hold that no rights attached, and there was no segregation of the land, notwithstanding the parties had performed all the three requirements stated by Justice Lamar in the case of Hastings and Dakota R. R. vs. Whitney above mentioned, since the rendition of that decision:

Where the patentee is a fictitious person, the filing and the patent are void. Muffitt vs. United States, 5th Supreme Court, Reporter, page 10.

An officer of the land department cannot make entry or

acquire any interest in the public land and any entry or filing so made is void. Lavagnio vs Whitney 70 Pac. 1046. Section 452 of the Revised Statutes of the United States reads as follows:

"The officers, clerks and employes in the general land office are prohibited from directly or indirectly purchasing or becomeing interested in the purchase of any of the public lands; and any person who violates this section shall forthwi th be removed from his office.

According to the contention of the appellees, if such officer should so far forget himself, as to make an affidavit in legal form, he might make entry, and acquire rights, notwithstanding the law. Such a doctrine is monstrous. The law says that a party who entered Oklahoma in violation of law could not make entry, the appellees say such persons could make entry, and segregate the land from the public domain. Which authority shall control this court ?

Where r pre-emption filing was obtained through fraud and a patent obtained, the patentee was trustee for the settler. Sanford vs. Sanford, 11th Supreme Court Reporter 666. This is a case where an entry was obtained, and the entryman's rights did not attach.

Where a person entered upon land in 1855, without right and the possession was continued without righ, the permission of the Register to prove up the possession and improvement, and to make entry under the pre-emption laws, were acts in violation of law and void.

Riley vs. Wells 14th Supreme Court Reporter 1166.

Where a Mexican land grant was confirmed in California the United States reserved a tract of land from settlement much larger than the grant, and when the grant was surveyed and approved by the Interior Department, that segregated the land from the public domain, and the surplus was subject to be disposed of under the land laws.

When the survey was made the state selected the overplus in lieu of Sec. 16 and 36 for the school land, before the survey was approved. After the survey was approved A filed on it as a homestead. Held that the state initiated the firse right

and was entitled to the land.

McCreary vs. Hascell. Supreme Court Reporter, Vol, 7, 176.

Where an inalienable land certificate was obtained and a forged power of attorney and a forged quit claim deed was executed in blank and patent obtained, and afterwards, the blank power of attorney, and the blank quit claim deed, were filled out and filed, these acts conveyed no title to the grantees. Grantees were trustees, and all the acts done by them are done as trustees. Where a bill in equity fails to show why the defendant did not discover certain frauds and deceits the bill is insufficient to disturb the party who is holding the title. Felix et al vs. Patrick. 12 Supreme Court Reparter, p 62.

Where a party intended to file on S. E. ¼ but filed on S. W ¼ and resided on S. E. ¼ for 30 years W filed on S. E. ¼ and obtained patent and sued for the land, a cross bill was filed to declare S. the trustee, no interest having attached by reason of his filing or patent. The holder of a patent in bad faith must always yield to a superior equity. As against the United States his title may be good, but not as against one who had acquired the prior right from the United States in course when his purchase was made under which his patent issued. The patent vested him with the legal title, but it did not determine the equitable relation between him and a third person. Widdicombe vs. Childers, 8th Supreme Court Reporter, page 517 and the authorities there cited.

Where the order withdrew the land from sale no right legal or equitable, were acquired by occupation or settlement. Wood vs. Beach 15th Supreme Court Reporter, page 410.

Occupying land with intent to make homestead entry, but failing to make filing until the land is withdrawn, for the benefit of a railroad, gives the settler no right in law or equity. Maddox vs. Burnham, 15th Supreme Court Reporter 448.

Where land was awarded to a railroad company, that was occupied by a homesteader, the award was void (the distinction between void and voidable acts defined.) Week vs. Ridgman 16th Supreme Court Reporter page 72.

The land department cannot over-ride an act of congress. Where land is set apart for any purpose, such as a city, and a party is permitted to make filing, and it culminates in a patent, in violation of law, the patent is void and confers no right or equity on the patentee. Berfenning vs. St. Paul R. R. Company 16th Supreme Court Reporter 1018.

The act opening Oklahoma is different from other statutes which congress had a right to make, and the United States Marshal's entry was invalid. Payne vs. Robinson, 18 Supreme Court Reporter 337.

The doctrine that an entry regular on its face, segregates the land is not the law. All decisions of the Supreme Court of the United States decide only the case under consideration. They do not decide in advance, all cases that may arise, on the same subject, but under a different state of facts, and under different Statutes.

A man by the name of Holgate filed a relinpuishment in Feb- 1864, and the University selected said land May 10, 1864, but the secretary did not act on the relinquishment until 1871. Held that such selection of the land in May held the land notwithstanding the relinquishment was not noted till 1871. This being the case the land was selected by the university before the entry was cancelled of record and the right of the University attached notwithstanding the filing. Kean vs. Bryger, 16 Supreme Court Reporter, page 278.

A party who located Chippewa Scrip, and obtained patent, in violation of law, the patent was void, and the United States allowed him to take the land by purchase. Fee vs. Brown 16th Sup. Court Reporter 875.

Where there is a suit between a railroad company and a miner as to whether the stone quarry was exempt from a railroad grant; held that the title of the R. R. did not attach, although the interior department had not determined that the land was mineral in character. Northern Pacific R. R. Co. vs. John A. Soderberg, Vol. 24 Sup. Court Reporter 365.

Where the railroad has made a permanent survey according to the act of 1866 they have a vested right to the land in the

place limit, but not in the indemnity limit, till it makes selection under the apyroval of the secretary. The fact that the secretary entered an order reserving said lands from settlement, would be contrary to law, and without effect, and the interest of the railroad would not attach to said land but the rights of the settler would attach, notwithstanding the order of the secretary. Oregon and California R R. Co. vs. The United States, 23rd Supreme Court Reporter 615.

A. had filed a pre-emption claim and abandoned it, but the filing had not been cancelled of record. The railroad afterwards filed its claim; held that the claim of the railroad was valid notwithstanding the fact that A's entry had not been cancelled of record, the time for making the filing having expired. Northern Pacific R. R. Company vs. DeLacey, 19th Sup. Court Reporter 791.

Where the Secretary of the Interior withdrew indemnity land from sale and settlement without authority of law, such action was void and the rights of a settler on said land would attach and he had a right to file on said land and prove up and obtain a patent thereto. Hunt vs. Shultz, 21 Supreme Court Reporter, 309. Moore vs. Stone 21 Supreme Court Reporter 322. The The above doctrine re-affirmed 22nd Supreme Court Reporter 232.

The even numbered sections of land were not subject to entry by the railroad company and the land department could do no act that would give them a right to the land, no more than if it was an Indian reservation. Clark vs. Herrington, 22nd Sup. Court Reporter 872.

Where parties are contesting for land, the party who first initiates the rights should prevail, though neither party had a vested right against the United States. Shipley vs. Cowan an, 23 Co. Op. Page 424.

Where a party filed on public land under the Oregon donation act, had abanoned the same fourteen years before the R. R. filed its definite location, the rights of the railroad attached, notwithstanding the uncancelled filing. Oregon and California R. R. Co. vs the United States, 23 Supreme Court Reporter, 673.

Where parties settled on land and the land office, believing that said land was segregated, refused to allow the filing or to do any act that would institute their record title; held that the location gave the rights which attach to the land and that the patents issued to the railroad company be cancelled, that the settlemest gave the equity. United States vs. M. K. & T. R. R. 12 Supreme Court Reporter Page 13.

The Land Department cannot overthrow the law of Congress. Buffington vs. Chicago & St. Paul R. R. Co. 16 Supreme Court Reporter, 1018.

The above authorities are not in conflict with the first decision cited. The decisions are all in harmony. The trouble is with the appellees., in construing the affidavits and entries made by John Gayman, to be an entry of the land in controversy. The law declares that a person who enters Oklahoma country in violation of law shall not be permitted to make entry or acquire any rights thereto. As we believe the acts of Congress of March 1, and 2nd, 1889, and the proclamation of the President, constituted the law with reference to entering lands in Oklahoma, we come to the conclusion that John Gayman never had an entry on the land in controversy. I could swear that I was President of the United States, and sign a patent to the public land, but it would be absurd to call the instrument a patent to public land, although it might be regular on its face. This doctrine of "Regular on its face," has made a deep and lasting impression on the appellees. A great many documents may be regular on their face, and be nothing, and convey no rights. A thief might make a deed conveying stolen propery, regular on its face, a lunatic might make a conveyance regular on its face. At the time John Gayman filed his relinquisment to the government, April 12, 1893 (Transcript 17) James L. Hodges was a settler on the land and had made permanent improvements and when Gayman filed said relinquishment the right of James L. Hodges attached at once. (Admiting for argument that John Gayman's filing was voidable) unless the relinquishment of Gayman was induced by the contest of William R. Colcord.

The relinquishment of Gayman was not induced by the

contest of Colcord (Transcript 17.) It would be as reasonable to say that Gayman's relinquishment was induced by the settlement of Hodges, and also by Hodges contest filed August 23, 1889. (Transcript 4.)

At the time William R. Colcord filed his contest July 23; 1889. James L. Hodges was a settler on the the land (Transcript 3) William R. Colcord had notice of the rights, of James L. Hodges at the time he filed his contest, because James L. Hodges was in possession of the land.

All of which is respectfully submitted in the court.

J. S. Jinkins
Attorney Appellant.

Solicitor for Appellants.

Over.

In the Supreme Court of the United States.

Ella M. Parker, Gertrude W. Hodges, William E. Hodges, heirs at law of James L. Hodges,
Appellants,
vs.
William C. Colcord, Henry S. Colcord, Charles F. Colcord and Mary L. Griffith,
Appellees.

Come now the appellants, and by leave of the Court, files this a correction of their brief on file, and also an additional list of authorities:

The first line of page 2 of the brief should be July the 23rd, 1889, instead of August 23rd, 1889.

The last line of page 10 of the brief should be the first line of page 12 of appellants' brief.

Appellants desire to submit the following list of authorities for the consideration of the Court, the same being the authorities relied on by the Supreme Court of the Territory of Oklahoma to sustain the theory that the filing of a party who entered the Oklahoma country in violation of law, segregated the land from the public domain, and initiated a right to the land, and gave it the character of private property:

Chotard vs. Pope, 12 Wheat. 586. Wilcox vs. Jackson, 13 Pet. 498. Carroll vs. Safford, 3 How. 441. Witherspoon vs. Duncan, 4 Wall. 210. Railroad Co. vs. Dunmyre, 5 Supreme Ct. Reporter 112. Sturr vs. Beck, 10 Supreme Ct. Reporter 350. Land Co. vs. Griffey, 12 Supreme Ct. Reporter 362. Whitney vs. Taylor, 158 U. S. 85.

Respectfully submitted.

J. S. JENKINS,
Attorney for Appellants.